

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

STRATTON PEAY, )  
Plaintiff, )  
v. ) Case No. 1:16-CV-130  
C.O. SAGER, et al, ) RE: Motion to dismiss  
Defendants. ) ECF No. 133

## **MEMORANDUM ORDER**

This action was received by the Clerk of Court on June 6, 2016 and was referred to United States Magistrate Judge Richard A. Lanzillo, for report and recommendation in accordance with the Magistrate Judges Act, 28 U.S.C. § 636(b)(1), and Rules 72.1.3 and 72.1.4 of the Local Rules for Magistrate Judges.

Defendant McKeel, one of many Defendants in this action, filed a motion to dismiss. ECF No. 133. In response, Plaintiff filed an opposition brief. ECF No. 146.

On November 4, 2020, Magistrate Judge Lanzillo issued a Report and Recommendation recommending that the motion to dismiss be granted and that McKeel be terminated from this action. Judge Lanzillo found that, in regard to Defendant McKeel: 1) Plaintiff failed to state an Eighth Amendment claim of deliberate indifference; 2) as a matter of law, Plaintiff could not sustain either an Eighth or Fourteenth Amendment claim based on the withdrawal of medical co-payments from his inmate account; and 3) the conspiracy claim against McKeel failed. Judge Lanzillo further concluded that “given the paucity of Peay’s allegations [against McKeel],” as well as “his three previous attempts to amend,” any fourth attempt at amendment was futile and should be denied. ECF No. 163.

Plaintiff filed Objections to the Report and Recommendation. ECF No. 166. In his Objections, Plaintiff argues that Magistrate Judge's Lanzillo erred by not addressing Plaintiff's opposition to the motion to dismiss.<sup>1</sup> In this regard, Plaintiff is correct. The Report and Recommendation erroneously states that Plaintiff failed to file an opposition.

However, the reasoning and rationale of the Report and Recommendation remain solid even in light of this error. Plaintiff's factual allegations do not rise to the level of a constitutional violation under either the Eighth or Fourteenth Amendments (or any other constitutional amendment). Plaintiff has also failed to state a claim for conspiracy. Moreover, Plaintiff's brief provides very little legal or factual opposition to McKeel's motion to dismiss instead conflating the claims against McKeel with the claims against the other Defendants (who have not moved to dismiss).

After *de novo* review of the complaint, Defendant McKeel's motion to dismiss, Plaintiff's opposition brief, together with the report and recommendation and objections thereto, the following order is entered:

AND NOW, this 10th day of December 2020;

IT IS ORDERED that Defendant McKeel's motion to dismiss [ECF No. 133] is granted.

IT IS FURTHER ORDERED that the Clerk of Court terminate McKeel as a Defendant to this action.

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<sup>1</sup> In his opposition brief, Plaintiff also generally argues that all Defendants are in violation of his First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment rights under the U.S. Constitution. Plaintiff does not provide factual details to support these bald legal claims.

AND, IT IS ORDERED that the report and recommendation of Magistrate Judge Lanzillo, issued on November 4, 2020 [ECF No. 163] is adopted as the opinion of the court as modified herein.

/s/ Susan Paradise Baxter  
**SUSAN PARADISE BAXTER**  
United States District Judge